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Nos. 778, 779, 830, 831, 832, 833, 834, 835, 836.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*, *Appellants*

NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant*

OSCAR GRUSS & SON, *Appellant*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE, *Appellant*

ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*, *Appellants*

BOSTON AND MAINE CORPORATION, *Appellant*

READING COMPANY, *Appellant*

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*, *Appellants*

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM OF APPELLEES, RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,[1] move, pursuant

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[1] Hereinafter referred to as the "New Haven Trustees." The United States District Court for the Southern District of New York is referred to as the "district court." The opinion, F. Supp. (October 19, 1967) of the district court, from which the instant appeals were taken, is set forth as Appendix B to the jurisdictional statement of Baltimore and Ohio Railroad Company ("B&O J.S."). "R." refers to the record certified to the Court by the district court. Other abbreviations herein are as used in the district court's opinion.

to paragraphs 1(c) and 1 (d) of Rule 16 of the Court, that the judgment of the district court in the *Penn-Central merger case* be affirmed for the following reasons:

I.

Whatever may be the legitimate interests of N&W in securing final determination of its contentions in the *N&W inclusion case,* judicial protection of such interests neither warrants nor requires further delay in consummation of the Penn-Central merger.

Whatever might prove to be the right of E-L and D&H to seek capital indemnification were there a downward revision in the terms for their inclusion in N&W, the Commission's reservation of jurisdiction provides adequate protection for these railroads following consummation of the Penn-Central merger.

II.

The course proposed by Gruss and the Committee would frustrate the New Haven's inclusion in Penn-Central, the very objective which they claim motivates their appeals.

No stay of consummation of the merger is necessary to ensure effective judicial review of all issues raised by these appellants concerning the final determination of fair and equitable terms for the New Haven's inclusion.

III.

The remaining appeals raise issues which do not go beyond simple disagreement with procedural and

policy determinations which have been delegated to the Commission and which manifestly were properly considered and determined by the Commission.

The Commission and the district court carefully followed and applied the Court's mandate of a year ago, and more than five years of administrative and judicial proceedings should now come to an end.

STATEMENT

In *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967), the Court enjoined consummation of the Penn-Central merger, authorized by orders of the Commission dated April 6 and September 16, 1966, pending further proceedings before the Commission in accordance with the Court's opinion. On June 9, 1967, the Commission issued its further report and order in the *Penn-Central merger case,* 330 I.C.C. 328, and its report and order in the *N&W inclusion case,* 330 I.C.C. 780, *modified,* 331 I.C.C. 22.

In *Oscar Gruss & Son* v. *United States,* 386 U.S. 776 (1967), the Court vacated the district court's adjudication in 261 F. Supp. 386 (1966) and remanded the case to the district court with the observation that "should appellant [Gruss] still be dissatisfied with the ultimate order of the Commission in the merger [Penn-Central] proceedings, it may attempt a fresh challenge in the District Court" (386 U.S. at 777). Gruss and the Committee filed supplemental complaints following the Commission's report and order of June 9, 1967.

Hearings on the first step of the New Haven Trustees' plan of reorganization which provided for a sale of the New Haven's assets to Penn-Central, pursuant to an agreement among the New Haven Trustees, PRR and NYC, commenced before the Commission on January 16, 1967. These were consolidated with hearings on the New Haven Trustees' plan of inclusion of the New Haven in Penn-Central and with related applications of PRR and NYC. The hearings concluded in May, 1967, and oral argument and briefing before the Commission were completed in July.

On April 5, 1967, following the Court's order in *Baltimore & Ohio,* the New Haven Trustees filed their petition for order no. 441 (R. 1967-1969) in the New Haven's reorganization proceeding.[2] They stated that there was a possibility that consummation of the Penn-Central merger might be substantially delayed or even aborted if protracted litigation should ensue after the determination by the Commission of the issues remanded to it. In view of the New Haven's then rapidly deteriorating financial condition, the New Haven Trustees informed the reorganization court of the remaining sources of financial assistance and requested instructions whether the New Haven's operations, which would involve additional substantial losses, should be continued. The Committee filed a cross petition seeking termination of the reorganization proceeding "to permit the orderly liquidation of the Debtor by the creditors" (R. 1973A).

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[2] *In the Matter of The New York, New Haven and Hartford Railroad Company, Debtor,* Docket No. 30226 (D. Conn.).

On July 11, 1967, Circuit Judge Robert C. Anderson, sitting by designation as the reorganization court, entered a Partial Ruling (R. 775-777), stating that, in view of cash attrition, the Commission should consider means for effecting the New Haven's inclusion in Penn-Central on an interim basis immediately upon consummation of the merger. On August 1, 1967, noting Judge Anderson's views, the Commission modified its June 9 order and found that provision should promptly be made for preservation of the New Haven's operations pending resolution of the issues involved in their final inclusion in Penn-Central (R. 1976A). The Commission considered that an appropriate means for interim continuation would be to require PRR and NYC upon consummation of their merger to conduct the New Haven's operations under a lease (R. 1977-1978).

On September 1, 1967, the New Haven Trustees advised the Commission that it would not be feasible to effect a leasing arrangement by January 1, 1968, when it was anticipated that the New Haven would lack operating funds. As an alternative, the New Haven Trustees proposed a form of *de facto* inclusion whereby Penn-Central would be required to share in the New Haven's operating losses pending its *de jure* inclusion and to lend the New Haven up to $25 million over a three-year period.[3] (R. 1983-2024) PRR and NYC

[3] The New Haven Trustees proposed that Penn-Central be required to assume New Haven's "Adjusted Net Deficit." The formula for determination of "Adjusted Net Deficit" is summarized in the district court's opinion (B&O J.S. B-26). In its summary, the district court notes, as was then reported by the New Haven Trustees, that some $5 million of operating costs were not included in the

concurrently proposed that Penn-Central would finance the New Haven on terms substantially similar to those suggested by the New Haven Trustees, but did not propose participation by the merged system in the New Haven's operating losses.

On September 12, 1967, the Commission modified its August 1 order, as requested by the New Haven Trustees, to require that consummation of the merger would constitute

> "an irrevocable assent . . . to lease the NH *or enter into a loan or other appropriate arrangement* with the NH for continuation of the NH's operations under such just, reasonable, and equitable terms as the Commission may require; provided, however, that such consummation shall not foreclose judicial review of any decision the Commission may make with regard to the effect operations under such arrangement might have upon the final adjustment of the inclusion terms" (B&O Applic. Stay, App. 2, p. 3, emphasis added).

There followed hearings, oral argument and briefs to the Commission.

By a second supplemental report, dated November 16, 1967, the Commission issued findings with regard to the terms for the New Haven's inclusion in Penn-Central, approved as a first step in the New Haven's reorganization a prompt conveyance of its assets to Penn-Central and fixed terms for interim financing and

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formula; at the Commission's hearings upon the Trustees' proposal, however, the Trustees corrected their former statement and showed that the formula for "Adjusted Net Deficit" did, in fact, include all unpaid operating costs.

sharing of the New Haven's operating losses by Penn-Central pending the New Haven's inclusion in Penn-Central.[4] The Commission specifically provided that consummation of the merger would constitute an irrevocable assent by Penn-Central to enter into such interim financing arrangements (App. A-4-5).

The cash problems adverted to by the Commission in its November 16, 1967 report had their genesis early in 1967. During the course of this year, there has been an ever increasing deterioration of the New Haven's operating results and cash position.

As to operations, for the seven months ending July 31, 1967, the New Haven's deficit in net railway operating income was $13.4 million, compared with $7.9 million in the comparable period of 1966 (R. 1962-1962A).

As to the cash position, on November 14, 1967, following the Court's order of November 9, 1967, fixing procedures before the Court in the instant proceeding, the New Haven Trustees filed a supplement to their petition for order no. 441 by way of a supplemental report on the financial condition of the New Haven.[5] Although stating that they were negotiating with public authorities for cash assistance, the New Haven Trustees advised the reorganization court that their purpose was

[4] It is understood that copies of the Commission's second supplemental report and accompanying orders, dated November 16, 1967, have been furnished to the Court. The second supplemental order and the order regarding interim financing, which accompany such report, are attached hereto as Appendix A and Appendix B, respectively.

[5] A copy of the supplement to petition for order no. 441 is attached hereto as Appendix C.

"to make it clear that at this juncture cash is not available to insure train service beyond early January" (App. C-5). The New Haven Trustees estimated that at December 31, 1967 the New Haven's working cash balance would be approximately $2 million (App. C-4). The New Haven's average weekly cash requirement for wages and supplies alone is approximately $1.75 million (R. 1962A). For the ten months ending October 31, 1967, the New Haven's cash attrition was $5.17 million (App. C-3).

The only alternative to inclusion of the New Haven's operations in the Penn-Central system is liquidation. In its August 1, 1967 order, the Commission again rejected all contentions that there may be solutions to the New Haven's problems other than inclusion in Penn-Central (R. 1977).

The district court found that the steps which are "urgent to avoid cessation of NH's vital service" are early consummation of the Penn-Central merger, and a Commission order prescribing some form of financial aid that will permit the New Haven's operations to continue beyond December 31, 1967 (B&O J.S. B-29). The district court concluded that "no one has contested the forecast of the NH Trustees that their cash will run out at the end of 1967," and stated that it was

> "unwilling to take responsibility for such devastating hardship as even a temporary cessation of NH's operations would bring to New England and New York and in a lesser degree to other sections of the country when in our view there is no reason why the merger should not proceed; indeed we believe we have no right to do so" (B&O J.S. B-70).

The Commission's report of November 16, 1967 provides the means for continuation of the New Haven's operations between consummation of the Penn-Central merger and the New Haven's inclusion. As stated by the Commission:

> "The choice is clear: either the public at large is forced to stand in the wings awaiting progress in transportation while the NH creditors haggle on stage over the wasting corpus of the NH estate, or, on the other hand, the overall objectives of the law are served, with the broad public interest brought into the scene in the form of improved service through a consummated Penn-Central merger including an operational NH, while the NH creditors are freed to litigate at will the distribution of their estate" (slip opinion, p. 14).

I. THE CONTENTIONS OF THE RAILROAD APPELLANTS*

The Commission has now satisfied E-L and D&H with respect to the protective conditions which were the primary issues they argued to the Court one year ago.

N&W's and C&O-B&O's present contentions do not differ in essence from those previously made. The Court summarized those contentions as follows:

> "the C&O-B&O group and the N&W system maintain that the conditions of the April 6, 1966 order give the protected railroads a vested interest in the Penn-Central merger which would result in the protected

* Reading appears not to raise the same questions as the other railroad appellants but to limit its appeal to matters of traffic protective provisions.

railroads diverting traffic to Penn-Central which would normally have gone to them" (386 U.S. at 385).

The public interest questions which were unanswered when this contention was initially made have, however, now received Commission findings. Further, each of the protected railroads has had terms fixed for its inclusion in the N&W system and could have no interest in diverting traffic to Penn-Central.

In seeking to delay the Penn-Central merger, the railroad appellants have, in substance, raised two questions. The first goes to whether the district court properly interpreted the opinion of the Court in the *Baltimore & Ohio case* as to the meaning of "ultimate fate." The second question seeks a determination as to whether a failure on the part of the protected railroads to carry out their "ultimate fate" should nullify the Commission's determinations as to the public interest in consummation of the Penn-Central merger.

The railroad appellants' contentions as to the first question are based upon the statements of the Court that it "is necessary that the decision as to the future of the protected roads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger" (386 U.S. at 390), and that "the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads" (*Id.* at 378). These quotations are the foundation for the contention that the Court intended that the Penn-Central merger should not be consummated until the "permanent home" of the three pro-

tected carriers *has been finally effectuated,* not merely determined (B&O J.S. 11).

The initial issue, therefore, is whether, in its reference to "ultimate fate," the Court intended to forestall consummation of the Penn-Central merger until the Commission had completed its proceedings concerning inclusion of the protected railroads, or whether consummation of the merger should additionally await final judicial review of all such determinations, entry of a final order affirming them, and the requisite corporate action, including a shareholders' vote.

The second question, which is based upon a determination of the first question as sought by the railroad appellants, is whether, "ultimate fate" having been determined, a failure or refusal on the part of a protected road to accept the "ultimate fate" which it had sought would abrogate the right of PRR and NYC to merge, although such failure or refusal is wholly outside the control of Penn-Central.

As to the initial question, the Court stated:

> "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger" (386 U.S. at 378).

This holding that "it was necessary for it [the Commission] to conclude the inclusion proceedings . . . " was wholly warranted by the contentions of N&W and C&O-B&O in the oral argument before the Court. It was there contended that one would not know "what

kind of animal Penn-Central is until we know what the conditions are.'" The implication of N&W's position before the Court a year ago was that their concern lay in the possibility, then open, that the protected railroads might eventually be included by the Commission in the Penn-Central system.

In its opinion the district court noted that E-L and D&H stressed to the Court, as they had previously to the district court, that their complaint related to the Commission's failure to finalize the protective conditions. They asked that the merger be stayed until adequate protective conditions had been formulated, not until the N&W inclusion proceedings had been completed (R. 1955-1955A, 1956-1956A). As the district court pointed out:

> "Only the argument of N&W and its allies that it was entitled to know exactly what Penn-Central would or would not include, since competition with a Penn-Central system containing the three roads would be more onerous than if these were in N&W,

[7] R. 1957A. Following such statement by counsel for N&W, there was the following colloquy:

"MR. JUSTICE WHITE: I would take it that approach would require the Commission to find a home for these three carriers prior to approving the merger, because otherwise you would never know what kind of animal you were dealing with, I mean on your own premise.

"MR. TRIENENS: I think that is correct, sir. I think that is correct.

"MR. JUSTICE WHITE: So you really think that Penn-Central merger must be held off until the Commission decides with what system these three are going to join?

"MR. TRIENENS: That is right. They have to find where the place is . . . " (R. 1957A-1958).

would be consistent with the broad reading now urged" (B&O J.S. B-65).

If the Court intended that "ultimate fate" refer to effectuation of inclusion, as distinguished from the Commission's determination of the inclusion issues, it is difficult to see how the Court could have reached the conclusion that "if its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made" (386 U.S. at 392). The Commission and the district court have amply demonstrated their concern with achieving the utmost expedition in carrying these proceedings to conclusion. Such concern notwithstanding, however, over eight months will have elapsed before the appellees are in a position to ask the Court whether its March 27, 1967 opinion requires that consummation of the merger be stayed only until the Commission has made findings as to inclusion of the three protected roads. If "ultimate fate" means completion of judicial review of each and every aspect of inclusion in the *N&W inclusion case,* as contended by the railroad appellants, there may be no end in sight in the *Penn-Central merger case.*

The answer to the "ultimate fate" contention, according to the district court, "would seem to be that the interests of N&W and those making common cause with it are protected by their right to oppose and challenge any future order including any of the three roads in Penn-Central" (B&O J.S. B-65).

The contentions, moreover, now go beyond merely claiming that the merger must be stayed until entry of a final order in the *N&W inclusion case.* It is now

claimed that a "permanent home" must be secured for the three protected carriers (B&O J.S. 11). This contention encompasses several further questions which are stated to be among the bases for the appeals in the *Penn-Central merger case.* Thus, questions are raised whether the district court properly followed *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194 (1947), whether the Commission properly observed the requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)), whether the Commission made all necessary findings under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)), and whether the Commission made adequate findings concerning the relationship of the Appendix G conditions and a pooling under Section 5(1). All of these questions involve the common hypothesis of a failure of one or more of the protected railroads to carry out its own inclusion in N&W. From this base, a broad variety of hypothetical possibilities may be propounded, such as the duration and effect of Appendix G and business practices under it in the case of a carrier which has the benefits of Appendix G but has chosen not to be included, and the effect of E-L or D&H or B&M failing to carry out the corporate acts necessary for consummation of its own inclusion. As the possible permutations are propounded, the easier it becomes for the railroad appellants to suggest, without foundation, that the Commission has failed to make some vital finding.

However, both the Commission and the district court have met this problem. As early as its September 16, 1966 report (328 I.C.C. 304), the Commission showed its

awareness that railroads seeking inclusion under Section 5(2)(d) of the Interstate Commerce Act might not accept the terms for inclusion fixed by the Commission. It then weighed the consequences of such a failure to accomplish an inclusion of the protected railroads in some system against the benefits which would flow to the public from a Penn-Central merger:

> "We recognize that we cannot at this time guarantee absolutely that E-L, D&H and B&M will be included in a major rail system or terms which they find satisfactory. However, we do not believe that this uncertainty is one which justifies postponement, perhaps for several years, of large public benefits which will flow from applicants' merger." (328 I.C.C. at 312)

Since the Transportation Act of 1940, the Commission has not had the power to initiate and enforce any restructuring of railroads deemed necessary to achieve the objectives of the National Transportation Policy (*Cf. St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 (1954)). Nevertheless, it remains charged with the task of "developing, coordinating and preserving a national transportation system" (National Transportation Policy, 49 U.S.C., preceding §1). This result is only possible through formulation of conditions cut to fit a particular pattern possible of achievement within the framework of voluntary proposals.

These conditions may, as in the instant cases, involve elaborate concepts. Thus, in its June 9, 1967 report in the *N&W inclusion case*, the Commission again made clear that it had fully considered the problems that

could be created from a failure on the part of E-L, D&H or B&M to go through with the inclusion in N&W which they themselves sought. In Appendix F to that report, the Commission provided that, if the stockholders of E-L, D&H or B&M should reject the terms and conditions of inclusion in N&W prescribed for their company, then such company's petition for inclusion in the Penn-Central system would be considered dismissed (330 I.C.C. 780, 868-869). This condition was coupled with other provisions of Appendix F that N&W could acquire control of D&H only if it acquired control of E-L, and could acquire control of B&M only if it acquired control of D&H (*Id.* at 868).

The Commission went on to provide, with specific correlation to condition 9 of Appendix A in the *Penn-Central merger case* (327 I.C.C. 475, *modified,* 328 I.C.C. 304, 322), that if D&H and B&M should not be included in N&W as a consequence of a failure by N&W to acquire control of E-L, the petitions of D&H and B&M in the *N&W inclusion case* would be considered denied (330 I.C.C. at 868). Further, if B&M's inclusion in N&W should be frustrated by reason of a failure on the part of D&H to be included in N&W, the petition of B&M to be included in N&W would be considered as having been denied (*Id.*). The effect of these conditions is to permit a protected railroad, whose inclusion in N&W has been frustrated by the refusal of another of the protected roads to carry out its own inclusion, to proceed with its petition to be included in Penn-Central. But any protected railroad which fails to

carry out its authorized inclusion in N&W cannot thereafter seek inclusion in Penn-Central.

These detailed conditions are further keyed to the Appendix G protective conditions in the *Penn-Central merger case.* Revised Appendix G in the June 9, 1967 report (as modified by a correction list dated June 27, 1967 and an order dated September 8, 1967) provides that the "Protective Period" under Appendix G shall end when the protected railroad has been included either in the N&W system or the Penn-Central system. If such protected railroad does not accomplish its inclusion within one year after being permitted to do so, however, the "Protective Period" shall end when the Commission so orders (330 I.C.C. 328, 362).[8]

Thus, in summary, if the Court affirms the Commission's orders for the inclusion of the protected railroads in N&W, a protected railroad will lose its right to seek inclusion in Penn-Central, and its right to protection under Appendix G is subject to termination upon order of the Commission if the railroad fails to carry through its inclusion within one year following the date of the Court's affirmation order. Under Appendix F in the *N&W inclusion case,* this result would be qualified if a protected railroad is frustrated in its inclusion in N&W by reason of the act of another protected railroad whose inclusion is a condition of the first railroad's inclusion.

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[8] Appendix G provides that the rights to protection are not affected until a "final determination." This is defined to mean an order which finally disposes of a protected railroad's petition for inclusion on a basis which leaves it with no further recourse with respect to such petition (330 I.C.C. at 362).

In this situation, the frustrated railroad would have the right to seek inclusion in Penn-Central, and the railroad causing the frustration would not only lose that right but would have its Appendix G protective conditions subject to termination by the Commission after one year.

Contrariwise, if the Court determines that any protected railroad should not be included in N&W, such protected railroad would have the right for a period of one year thereafter to seek inclusion in Penn-Central, and would have protection under Appendix G until its petition had been finally determined. If the protected railroad fails to petition for inclusion in Penn-Central or, having so petitioned, should fail for one year to avail itself of a right to be included in Penn-Central, the protection of Appendix G may be terminated.

Even if it is assumed that the Commission has not specified every conceivable hypothetical permutation arising in the *N&W inclusion case* from a refusal on the part of a protected railroad to carry out its right to inclusion, or from a judicial reversal of the Commission's findings as to inclusion, or the terms thereof, there can be no reasonable argument that the Commission has failed to consider the consequences of a frustration of inclusion in the case of one or more of the protected railroads, or that it has not retained the necessary jurisdiction to administer the protective conditions of Appendix G in the *Penn-Central merger case* in a manner which would ensure the appropriate balancing

at all times of conflicting claims involving the public interest.[9]

E-L and D&H join with N&W and C&O-B&O in the argument that there has been error on the part of the Commission and the district court in not preserving a right for E-L and D&H to secure "capital loss indemnity" from Penn-Central. They claim that such an indemnity would be necessary in the event that judicial review of the *N&W inclusion case* produces a downward revision of the inclusion terms because of a reversal of the Commission's findings with regard to the traffic consequences of the Penn-Central merger upon the protected railroads as part of the N&W system.

The district court fully considered this contention (B&O J.S. B-16). On the one hand, it doubted that the Court, or the Commission on a remand, would subscribe to the view that "N&W can only be required to pay a sum which takes account of post-Penn-Central-merger losses, or — for that matter — would accept the view of E-L and D&H that the Interstate Commerce Act requires them to be compensated for any decrease in price resulting from such losses." On the other hand, the district court made clear that it considered that PRR and NYC would be subject to any payment of this nature that the Court might direct the Commission to impose if the merger should be consummated before a

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[9] The argument (B&O J.S. 14) that the Commission has left an alternative open to each of the protected roads "to shop with Penn-Central for even more favorable financial terms" is insupportable in the light of the pattern of the protective provisions and conditions.

final disposition by the Court of the *N&W inclusion case.*

Not only are these observations of the district court of great weight in minimizing the significance of the issue of capital loss indemnification, but it appears that the Commission reserved jurisdiction in the *Penn-Central merger case* broad enough to encompass any consideration of the issue which might hereafter prove to be appropriate. It there concluded "that no need is shown for any capital loss indemnification condition herein" and went on to provide:

> "We reserve jurisdiction to reopen these proceedings for the purpose of modifying any or all of the provisions herein set forth in the light of experience" (330 I.C.C. at 362).

It is submitted that all necessary findings have been made by the Commission and that there is no remaining issue raised by the railroad appellants which would warrant further delay in consummation of the Penn-Central merger.[10]

II. THE CONTENTIONS OF NEW HAVEN BONDHOLDER APPELLANTS

The appeals of both Gruss and the Committee would require a postponement of consummation of the Penn-Central merger until such time as the New Haven's inclusion could be concurrently accomplished. In view

[10] Since Reading does not seek a stay in consummation of the merger pending determination of the traffic protective issues which it raises, the New Haven Trustees do not consider it necessary to take any position with regard to the questions raised by Reading.

of the critical cash position of the New Haven, the course these appellants urge would thwart the very result which they seek for the simple reason that the New Haven cannot survive until completion of proceedings for determination of the terms of its inclusion in Penn-Central under both the Bankruptcy Act and the Interstate Commerce Act.

The New Haven's critical financial circumstances and lack of cash do not permit the slightest hope that it could survive an extended period, even if consummation of the Penn-Central merger could, as a practical matter, be postponed. Neither Gruss nor the Committee give any suggestion as to how the operations of the New Haven could be continued during such postponement, no matter how shortened was the period for final determination of inclusion terms.

As pointed out by the district court:

> "Insofar as the complaints seek to enjoin consummation of the merger pending inclusion of the properties of NH by way of sale, they are sufficiently answered by Judge Anderson's order of July 11. In his view any substantial postponement of consummation means speedy death for the New Haven; hope lies rather in early consummation subject to a commitment that will fairly assure continued operation while the administrative and judicial mills continue their painfully slow grind." (B&O J.S. B-28)

By its second supplemental report dated November 16, 1967, the Commission has provided a means whereby an interim *de facto* inclusion of the New Haven can be

accomplished pending the completion of the "painfully slow grind" which remains. At the same time, the Commission has approved, as a first step in the New Haven's reorganization, a prompt conveyance of its assets to Penn-Central upon prescribed terms and conditions, found to be fair and equitable, without waiting for the proceedings necessary to determine the treatment of claimants having an equity in the estate.

Thus, not only has the Commission required Penn-Central to participate in the New Haven's operating losses pending conveyance of the New Haven's assets, but it has provided a means to terminate the entire burden upon the estate of its present operations. At the same time, the appellants, as well as all other interested persons, will have the right to object to, and have judicial review of, these determinations by the Commission.

Gruss and the Committee argue that such judicial review will not be effective. To the extent that it is argued that the New Haven may not survive long enough for judicial review, the contention is met by the interim relief provided in the Commission's November 16 report; the New Haven will be supported during the period pending conveyance of its assets to Penn-Central. Otherwise, unless these appellants desire to attack inclusion itself, the only issues which would remain for judicial review relate solely to the *quantum* of the interim participation by Penn-Central in the New Haven's operating losses or the total consideration to be paid by Penn-Central for the New Haven's assets.

None of these questions of *quantum* of consideration requires postponement in consummating the merger in order to secure full and effective judicial review, so long as the Commission has the power to carry out the mandate of such judicial review. In this regard, the Commission has ordered:

"That as a prerequisite to this Commission's approval of the transactions authorized in 327 I.C.C. 475, The Pennsylvania Railroad Company and The New York Central Railroad Company are authorized and directed to include The New York, New Haven and Hartford Railroad Company, and its affiliates and subsidiaries, including the New England Transportation Company, in their system in the manner and under the terms found equitable and conditions prescribed in the said second supplemental report;

* * *

"That consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company shall constitute an irrevocable assent of The Pennsylvania New York Central Transportation Company to enter into a loan arrangement with the Trustees of The New York, New Haven and Hartford Railroad Company in accordance with the terms and conditions required in the said second supplemental report;

* * *

"That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act." (App. A-2, 4-5)

As to inclusion itself, the appellants are aware of the lack of alternatives. The district court pointed out:

> "In its order of August 3, 1967 the Commission reiterated its conclusion that contentions 'that there are possible solutions to the NH problem other than inclusion in Penn-Central are without merit,' and at the argument before us Gruss' counsel conceded that the only alternative to inclusion in Penn-Central is liquidation. While the Committee holds out the possibility of condemnation by the four states served by NH, wishful thinking will not meet imminent payrolls." (B&O J.S. B-28)

The district court observed that these appellants no longer seriously seek to postpone consummation of the Penn-Central merger indefinitely, but are attempting to make Penn-Central responsible for all operating losses of the New Haven, whether or not caused by their merger, until the New Haven either itself ceases to operate or is included in the Penn-Central system (B&O J.S. B-28). As the district court pointed out:

> "Penn-Central is understandably unwilling voluntarily to go so far, although under the Commission's order of September 12 the companies by consummating the merger take the risk, subject only to the safeguard of judicial review, that they may be compelled to do just that. *Per contra,* if the Commission's order should prove unsatisfactory to the plaintiffs [the appellants], they too will be entitled to seek review." (B&O J.S. B-28-29)

The Commission's second supplemental report of November 16, 1967 makes it clear that PRR and NYC must accept inclusion of the New Haven upon the terms

set forth in the report if they proceed to consummate their merger. Similarly, they must accept the terms fixed by the Commission for interim relief. In neither instance does it appear that PRR and NYC would have any right to litigate once the merger has been consummated. On the other hand, there is no restriction, express or implied, on the right of these appellants to litigate questions either of the New Haven's "interim inclusion" or the terms for its *de jure* inclusion. The Commission's overall reservation of jurisdiction, we submit, would protect these appellants in any revisions required upon judicial review. Thus, their rights to litigate having been fully preserved, these appellants should not be permitted to thwart preservation of the New Haven's operations.

Among the other contentions made by these appellants is Gruss' argument that the Commission failed to hear his application for "immediate inclusion." Gruss argues, in part, that the New Haven Trustees left the first mortgage bondholders without representation in the Penn-Central merger proceedings and "contracted away" their rights (Gruss J.S. 11-12, 33-34). Essentially the same arguments were made before the district court in the first *Gruss case* (261 F. Supp. 386 (1966)) and were properly considered to be issues for the reorganization court. Subsequently, by way of answer to the New Haven Trustees' petition for order no. 441, Gruss made the same points to the reorganization court and requested that the Trustees be instructed in accordance with its views (Gruss J.S. 33A, 36A). In its Partial Ruling on petition for order no. 441 (R. 2003-

2005), the reorganization court refused so to instruct the New Haven Trustees and stated that "the Trustees have quite properly felt under a duty to continue their support of the agreement thus entered into and avoid any action which would be or appear to be a repudiation of its letter or spirit" (R. 2004).

Gruss complains that in reaching their agreement with PRR and NYC in December, 1964, the New Haven Trustees changed their position as to the time when the New Haven should be included in Penn-Central and that, accordingly, it was necessary for Gruss to file its petition on July 11, 1966 with the Commission for postponement of the merger until the New Haven could be included (Gruss J.S. 32-34). In fact, however, Gruss was fully aware of the agreement reached between the New Haven Trustees and PRR and NYC as early as April, 1965 (Gruss J.S. 32), and advised the Commission in July, 1965 that it had no objection to the examiners' report issued in April, 1965 requiring inclusion of the New Haven's freight service in the Penn-Central system. Its letter was stated to be "for the purpose of making *one minor suggestion* — namely, that the condition . . . be expanded to require the merged Pennsylvania-New York Central to assume responsibility for those operations upon the effective date of the merger, *if prior thereto the parties have not come to an agreement as to terms*" (App. D-2, emphasis added).

Thus, contrary to present contentions, Gruss not only was in a position to have filed its petition seeking immediate inclusion one year earlier than it did, but it

even advised the Commission at such earlier time that it considered the question of immediate inclusion to be a "minor suggestion." Furthermore, even as to that suggestion, Gruss stated that it would be satisfied if, prior to the effective date of the merger, the parties had come to an agreement as to terms. At that time, Gruss was aware that the New Haven Trustees had reached an understanding with PRR and NYC which was reported, to Gruss' knowledge, on April 7, 1965 (Gruss J.S. 32). That understanding "was formalized a year later in the Sale Proposal dated April 21, 1966" (Gruss J.S. 32-33). These contentions of Gruss as to the need for it to act on behalf of the estate, its claims as to the Trustees' failure to represent the estate, and its argument that it was deprived of a hearing, have no support in the record of the proceedings.

A further contention, made by the Committee, is that the Commission's orders are deficient in failing to provide the equivalent of Appendix G protective conditions for the New Haven pending its *de jure* inclusion in Penn-Central.[11]

The district court rejected these contentions on the ground that an indemnification provision, such as con-

[11] As part of this argument it is contended that the Commission has not determined the "ultimate fate" of the New Haven consistent with the Court's opinion in the *Baltimore & Ohio case*. But whatever the Court intended by "ultimate fate," at the time of the *Baltimore & Ohio case* when there had been no findings as to the system in which E-L, D&H and B&M were to be included, there was not only a Commission decision requiring inclusion of New Haven in the Penn-Central system, but also an agreement among the New Haven Trustees, PRR and NYC as to terms of such inclusion.

tained in Appendix G, would have the practical effect in the New Haven's case of simply producing an addition to the purchase price (B&O J.S. B-29-30). In its second supplemental report of November 16, 1967, the Commission again considered the questions of indemnification and traffic protective conditions. It pointed out that the standard traffic protective conditions imposed in its report of April 6, 1966 will apply until the New Haven has been included in Penn-Central (slip opinion, p. 136). The Commission further concluded that the record does not justify the imposition of indemnification provisions, pointing out:

> "The evidence here indicates that the Penn-Central merger will not have any significant adverse effect on the NH for several years. Before any such effect occurs, the NH should be included in Penn-Central. Moreover, we have provided herein interim support for NH by Penn-Central pending consummation of the inclusion. It is not unreasonable to believe that the transfer of the NH assets to Penn-Central ownership will have passed before the NH suffers any important loss of traffic. If any unusual or unforeseen circumstances warrant our reconsideration of this matter, our general reservation or [*sic*] jurisdiction in this case can serve as a means for reexamining our position and further examining price. See *Oscar Gruss & Son* v. *United States,* 261 F. Supp. 386, 390 (S.D. N.Y. 1966), aff'd. 386 U.S. 776." (slip opinion, p. 136)

In their jurisdictional statements, both Gruss and the Committee raise questions whether the ultimate terms for the New Haven's inclusion will prove to be fair and equitable. In this regard, contentions are made

that it may not be possible for the Commission to fix terms which would make inclusion "feasible" (Committee J.S. 15) and that there can be no fair alternative to an interim "lease or conveyance" (Gruss J.S. 25). The Commission now having made findings by its second supplemental report dated November 16, 1967 as to fairness and equity of the proposed terms and having established a specific pattern for interim protection and speedy conveyance of the New Haven's assets, the issues raised by Gruss and the Committee in these respects may properly be considered to be confined to the question whether judicial review of such findings would be effective. As already shown, the New Haven Trustees consider that there is no obstacle to review by any interested person of those findings and orders and, in view of the Commission's reservation of jurisdiction, the mandate of any judicial review could be made effective.

It is submitted that neither Gruss nor the Committee raises a substantial question which would warrant a further stay of consummation of the Penn-Central merger.

III. THE CONTENTIONS OF OTHER APPELLANTS[12]

It appears that Scranton and Shapp contend that the Commission's findings approving the Penn-Central merger are not supported by the record. In essence,

[12] Since the remaining appellants, other than Scranton and Shapp, do not seek to stay consummation of the Penn-Central merger pending determination of the issues they have raised, the New Haven Trustees do not consider it necessary to take any position with respect thereto.

they contend consummation of the merger would be contrary to the public interest.

The record before the Commission establishes that over 90 states, cities, towns, boroughs, counties, regulatory commissions, and other public agencies participated in various stages of this proceeding. Except for Scranton, none of these opposes consummation of the Penn-Central merger. Of the 13 states which participated in the Commission proceedings, none opposes consummation of the merger and four have consistently urged that it be consummated without further delay.

As the district court pointed out, questions of the nature raised by these appellants were delegated by Congress to the Commission, which must carry the burden of protecting the public interest. To be sure, the Commission's decisions are, and should be, subject to judicial review. However, the importance of such review does not detract from the weight to be given to the findings of an independent agency charged with the function of making such findings.

Quite apart, however, from the support to be derived from the position of the public bodies appearing in the proceedings, the administrative decision reached by the Commission is wholly sustained by the record and has twice been affirmed by the district court upon full review and consideration.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed, and the stay should be dissolved.

Respectfully submitted,

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Attorney for Appellees,
Richard Joyce Smith and
William J. Kirk, Trustees of
the property of The New York,
New Haven and Hartford
Railroad Company, Debtor

November 27, 1967

SECOND SUPPLEMENTAL ORDER

At a General Session of the
INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C., on the
16th day of November, 1967.

Finance Docket No. 21989

PENNSYLVANIA RAILROAD COMPANY—
MERGER—NEW YORK CENTRAL
RAILROAD COMPANY

Finance Docket No. 21990

PENNSYLVANIA RAILROAD COMPANY
STOCK ISSUANCE

Finance Docket No. 24361

PENNSYLVANIA RAILROAD COMPANY
SECURITIES AND ASSUMPTION
OF OBLIGATIONS

Finance Docket No. 21669

NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY REORGANIZATION

Investigation of the matters and things involved in these proceedings having been made, further hearings having been held, and the Commission on the date hereof having made and filed a second supplemental report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That as a prerequisite to this Commission's approval of the transactions authorized in 327 I.C.C. 475, The Pennsylvania Railroad Company and The New York Central Railroad Company are authorized and directed to include The New York, New Haven and Hartford Railroad Company, and its affiliates and subsidiaries, including the New England Transportation Company, in their system in the manner and under the terms found equitable and conditions prescribed in the said second supplemental report;

It is further ordered, That as part of the terms and conditions of said inclusion the Trustees of The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, and The New York Central Railroad Company be, and they are hereby, directed to file with the Commission a loan agreement, an amendment to their agreement dated April 21, 1966, as modified October 4, 1966, and an appropriate form of Trustees' certificate in accordance with the terms and conditions in the aforesaid second supplemental report of the Commission no later than 35 days from the date of service of this order;

It is further ordered, That, subject to the terms and conditions in the aforesaid second supplemental report applicable thereto, The Pennsylvania Railroad Company is authorized to issue to the Trustees of The New York, New Haven and Hartford Railroad Company in connection with acquisition of the assets of that railroad (a) 950,000 shares of its common stock of the par value of $10.00 per share, additional shares as may be made necessary by the purchase price adjustments and anti-

dilution provisions referred to in said report, and (b) $23,000,000 principal amount of 25-year Divisional First Mortgage Bonds, and such larger principal amount of bonds as may result from operation of the purchase price adjustment provisions; and to assume obligation and liability in respect of equipment trust obligations guaranteed by The New York, New Haven and Hartford Railroad Company and described in the application in Finance Docket No. 24361, the bonds and certificates of contingent beneficial interest to be issued pursuant to the Boston and Providence Railroad Corporation plan of reorganization, as described in *Boston & P. R. Corp. Reorganization,* 327 I.C.C. 10, and any other securities hereafter issued, assumed, or guaranteed by the Trustees of The New York, New Haven and Hartford Railroad Company under section 20a of the Interstate Commerce Act prior to acquisition of the properties of The New York, New Haven and Hartford Railroad Company by The Pennsylvania Railroad Company which the latter may be required to assume or guarantee pursuant to the terms of the aforesaid agreement;

It is further ordered, That The Pennsylvania Railroad Company shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 156.6);

It is further ordered, That, except as herein authorized, said stock and bonds shall not be sold, pledged, repledged, or otherwise disposed of by The Pennsyl-

vania Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That, if the authorities herein granted are exercised, The Pennsylvania Railroad shall submit for the consideration of this Commission three copies of the journal entries required to record the transactions and confirm in writing to this Commission, immediately after consummating the transactions authorized in Finance Docket No. 21989, the effective date of such consummation;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock or bonds, or dividends thereon, on the part of the United States;

It is further ordered, That the petition of Oscar Gruss & Son filed March 20, 1967, be, and it is hereby, dismissed;

It is further ordered, That the terms for the sale of the assets of the New York, New Haven and Hartford Railroad Company, Debtor, to the Pennsylvania New York Central Transportation Company, originally filed as the first step of the plan of the Trustees of the New York, New Haven and Hartford Railroad Company, Debtor, for reorganization of that carrier, as described in said report, be, and they are hereby, approved;

It is further ordered, That consummation of the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company shall constitute an irrevocable assent of The Pennsylvania New York Central Transportation Company to enter into a

loan arrangement with the Trustees of The New York, New Haven and Hartford Railroad Company in accordance with the terms and conditions required in the said second supplemental report;

It is further ordered, That this order shall take effect and be in force 35 days from and after the date of its service and the inclusion directed is to be accomplished within 90 days from the date transfer of the assets of The New York, New Haven and Hartford Railroad Company to the Pennsylvania New York Central Transportation Company, pursuant to the report herein.

And it is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate, in addition to those orders under jurisdiction expressly retained in the prior reports and orders of the Commission and to those orders which may be issued under section 5(9) of the Interstate Commerce Act.

By the Commission.

H. NEIL GARSON
Secretary

(SEAL)

ORDER

At a General Session of the
INTERSTATE COMMERCE COMMISSION,
held at its office in Washington, D. C.
on the 16th day of November, 1967.

Finance Docket No. 24756

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY TRUSTEES' CERTIFICATES

Richard Joyce Smith and William J. Kirk, Trustees (applicants) of the property of The New York, New Haven and Hartford Railroad Company (New Haven) having filed on September 25, 1967, an application under section 20a of the Interstate Commerce Act for authority to issue Trustees' certificates in an aggregate principal amount not exceeding $25,000,000 to evidence loans to be made by The Pennsylvania New York Central Transportation Company from time to time within three years from the date of the merger of The New York Central Railroad Company (Central) into The Pennsylvania Railroad Company (Penn) upon applicants' request; and

It appearing, That the purpose of the proposed issue is to finance continued operations of the New Haven pending its inclusion in the Penn-Central system;

It further appearing, That the matter of the loan agreement and the contents of the Trustees' certificates

has been considered by the Commission after oral hearing and that the Commission has made findings and conclusions thereon in its second supplemental report after further hearing in Finance Docket No. 21989, et al., *Pennsylvania Railroad Company — Merger — New York Central Railroad Company,* issued concurrently with the service of this order, which findings and conclusions, to the extent applicable, are incorporated herein; and

It further appearing, and the Commission so finds, That the issue by applicants of their Trustees' certificates in an aggregate principal amount not exceeding $25,000,000, to be dated the date of their issue, to mature December 13, 1971, and to bear the prime interest rate of the Morgan Guaranty Trust Company of New York at the time of issue (a) is for a lawful object within the duly authorized purposes of the applicants, and compatible with the public interest, which is necessary for and consistent with the proper performance by the applicants of service to the public as a common carrier and which will not impair the applicants' ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

It is ordered, That applicants be, and they are hereby, authorized to issue, in evidence of said loan, their Trustees' certificates in an aggregate principal amount not exceeding $25,000,000, to be dated the date of their issue, to mature December 13, 1971, and to bear the prime interest rate of the Morgan Guaranty Trust Company of New York at the time of issue;

It is further ordered, That the applicants shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 156.6);

It is further ordered, That, except as herein authorized, said Trustees' certificates shall not be sold, pledged, repledged, or otherwise disposed of by the applicants unless or until so ordered or approved by this Commission; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said Trustees' certificates on the part of the United States.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX C

Supplement to Petition for Order No. 441

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD

In the Matter of The New York, New Haven and Hartford Railroad Company, *Debtor.*	No. 30226

SUPPLEMENTAL REPORT OF TRUSTEES ON THE FINANCIAL CONDITION OF THE DEBTOR'S ESTATE

1. On April 5, 1967, the Trustees reported to this Court on the status of the Penn-Central merger proceedings as a result of the Supreme Court's decision in *Baltimore & Ohio R. Co.* v. *United States,* 386 U.S. 372 (1967). They noted that should substantial delay in consummating the Penn-Central merger result from the further proceedings before the Interstate Commerce Commission, pursuant to the Supreme Court's decision, cash generated from rail service might be insufficient to permit maintenance of the New Haven's operations in the interim preceding its inclusion in Penn-Central. The Trustees described various sources from which further cash might be made available and

prayed for instructions concerning their future course of action.

2. By cross-petition dated April 26, 1967, the First Mortgage 4% Bondholders Committee requested that this Court terminate these proceedings to permit a liquidation of the Debtor by its creditors. Following hearings on May 1 and June 19, 1967, this Court issued its Partial Ruling on Petition for Order No. 441, dated July 11, 1967. Thereafter, the Interstate Commerce Commission instituted proceedings on the question of a lease or other appropriate arrangement by which the merged Penn-Central would be required to provide for continuation of the New Haven's operations during the period commencing with consummation of the Penn-Central merger and ending with the conveyance of the New Haven's assets to Penn-Central pursuant to a reorganization plan of the Debtor. The matter is now under advisement by the Commission.

3. On June 9, 1967, pursuant to the remand of the Supreme Court in *Baltimore & Ohio R. Co.* v. *United States,* the Interstate Commerce Commission entered a Supplemental Report on reconsideration and further hearing in the Penn-Central Merger Case; and a Supplemental Report providing for inclusion of the Erie-Lackawanna Railroad Company, Delaware and Hudson Railroad Company, and Boston & Maine Corporation into the Norfolk & Western Railway System (the N & W Inclusion Action).

4. On October 19, 1967, a statutory three-judge court, convened in the United States District Court for

the Southern District of New York, rendered its decision in several actions brought to enjoin enforcement of the orders of the Interstate Commerce Commission authorizing consummation of the Penn-Central merger and the inclusion of the three railroads referred to in paragraph 3 hereof in the N & W System. (*Erie-Lackawanna Railroad Company* v. *United States,* S.D. N.Y., 66 Civ. 2860, 2903, 2914, 3413, 67 Civ. 2451.) In summary, the decision upheld the orders of the Interstate Commerce Commission, but stayed said orders for fifteen days to permit the filing of any notices of appeal and prosecution thereof before the Supreme Court.

5. By order dated November 9, 1967, the Supreme Court continued the stays in the Penn-Central Merger Case and in the N & W Inclusion Action, consolidated the appeals in said actions, and set oral argument for December 4, 1967. Among the appellants and applicants for stay in the Penn-Central Merger Case are the First Mortgage 4% Bondholders Committee and Oscar Gruss & Son.

6. Pending resolution of the issues now before the Supreme Court and the Interstate Commerce Commission, the New Haven's cash problem continues. The substantial cash attrition which the Trustees reported would occur in 1967 has steadily increased and resulted in a cash loss of $5,174,000 for the first ten months of 1967, after taking into account the receipt of $1,008,000 as free cash from the Boston Terminal Corporation pursuant to Order No. 468 herein. Barring unforeseen

contingencies beyond their control, the Trustees anticipate that there will be sufficient cash to support operations until December 31, 1967, when it is estimated that the working cash balance will be approximately $2,000,000. This estimate assumes that the Trustees will receive $500,000 before year-end from Providence Produce Warehouse Company pursuant to Order No. 478 herein, but does not include any possible additional financial assistance from public authorities referred to below.

7. Under present forecasts and absent the availability of additional funds, the working cash balance in the early part of January, 1968 will be inadequate to discharge operating expenses and to maintain current operations.

8. The Trustees have made these facts known to public authorities and are exploring with them methods of providing interim financial assistance by grant, loan, or other appropriate means. Negotiations with the United States Department of Transportation have resulted in a proposed agreement under which the estate would be reimbursed for expenditures made to upgrade the right of way between Boston and New York for the conduct of experimental high-speed passenger service under a federal demonstration project. If this Court approves this proposal, federal funds of approximately $500,000 should become available toward the end of December, 1967. Other substantial sources of cash must be found, however, to prevent disruption of service. While the Trustees are conducting negotia-

tions to this end, precise recommendations cannot be formulated until the status of pending proceedings before the Supreme Court and the Interstate Commerce Commission permits a clearer assessment of the future of the Debtor's reorganization. The purpose of this report is to make it clear that at this juncture cash is not available to insure train service beyond early January.

Dated: November 14, 1967.

Respectfully submitted,

RICHARD JOYCE SMITH and
WILLIAM J. KIRK,
Trustees of the property of The New York, New Haven and Hartford Railroad Company,

By

JAMES WM. MOORE
Counsel for Trustees.

JUDSON C. MCLESTER, JR.
Counsellor at Law
164 Lincoln Road
Westfield, New Jersey
201 – 233-6811

July 9, 1965

Interstate Commerce Commission
Washington, D.C.

Re: *Finance Docket No. 21989–90*

Gentlemen:

Oscar Gruss & Son, holders of $10,556,000.00 Principal amount of New York, New Haven & Hartford Railroad Company, First and Refunding Mortgage 4% Bonds, have intervened in the proceeding before this Commission for the reorganization of that Railroad, Finance Docket No. 21669. As such holders of New York, New Haven & Hartford Railroad Company Bonds, Oscar Gruss & Son are vitally interested in the conditions relating to that Railroad to be included in any order of this Commission authorizing merger of the Pennsylvania and New York Centrol Railroads.

The recommendation in the Examiners' Proposed Report for the merged Pennsylvania – New York Central to acquire the New Haven's freight operations upon terms to be fixed by this Commission if the parties are unable to agree (F.D. 21989-90) is entirely fair and reasonable. Oscar Gruss & Son having no objection thereto, have not sought to intervene in this proceeding which has so many ramifications relating to the broad public interest.

However, Oscar Gruss & Son respectfully request that this letter be made a part of the Record in Finance Docket No. 21989-90 for the purpose of making one minor suggestion — namely, that the condition relating to acquisition of the New Haven's freight operations be expanded to require the merged Pennsylvania-New York Central to assume responsibility for those operations upon the effective date of the merger, if prior thereto the parties have not come to an agreement as to terms.

Such a provision would be consistent with the Examiner's proper concern that New Haven interests should not be placed in a position to delay indefinitely the Pennsylvania – New York Central merger.

At the same time it would prevent the Pennsylvania-New York Central resorting to delaying tactics which would permit New Haven's operating losses to consume all its valuable assets before the transfer of its freight operations can be consummated.

This, we believe, is fair to all parties concerned.

Respectfully submitted,

JUDSON C. MCLESTER, JR.
Counsel for
Oscar Gruss & Son

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James Wm. Moore, Esq.
Counsel for Trustees

Manufacturers Hanover Trust Co.
Trustee First & Refunding Mortgage

Mr. A. Frederick Keuthen
Successor Individual Trustee, 1st & Refunding Mortgage

United States Trust Co. of New York
Trustee, Harlem River Division Ind. of 1st Mortgage

The Chase Manhattan Bank
Trustee, General Income Mortgage

Mr. Joseph R. Thompson
Successor Individual Trustee, General Income Mortgage

Secretary of the Treasury of the United States

Hon. Edward W. Brooke, Attorney General
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